

**BEFORE THE APPEALS BOARD  
FOR THE  
KANSAS DIVISION OF WORKERS COMPENSATION**

**JOYCE M. DAVIS**

Claimant

VS.

**CARESTAF OF KANSAS CITY, INC.**

Respondent

AND

**COMMERCE & INDUSTRY INS. CO.**

Insurance Carrier

Docket No. 1,031,299

**ORDER**

Respondent and its insurance carrier request review of the April 30, 2007 preliminary hearing Order entered by Administrative Law Judge Steven J. Howard.

**ISSUES**

At the April 24, 2007 preliminary hearing the respondent denied claimant suffered a compensable injury or provided timely notice. But the parties indicated they would agree upon an appropriate specialist to treat the claimant if her claim was found compensable. The Administrative Law Judge's (ALJ) Order contained no findings of fact or conclusions of law only a finding that the parties were to agree upon a Kansas physician to treat the claimant.

K.S.A. 44-534a(2) provides that upon a preliminary finding that a claim is compensable an ALJ may make a preliminary award of medical compensation. Consequently, it is implicit in the ALJ's order directing the parties to agree upon a treating physician that the underlying compensability issues of injury arising out of and in the course of employment as well as timely notice were determined in claimant's favor.

The respondent requests review of whether claimant's accidental injury arose out of and in the course of employment. Respondent further argues claimant failed to provide timely notice of her injury.

Claimant argues the ALJ's Order should be affirmed.

**FINDINGS OF FACT AND CONCLUSIONS OF LAW**

Having reviewed the whole evidentiary record filed herein, this Board Member makes the following findings of fact and conclusions of law:

Joyce Davis was employed as a Certified Nursing Assistant for the respondent. She provided in-home assistance to assigned patients. On July 5, 2006, she had been assigned to provide assistance to a stroke patient in Overland Park, Kansas. Her job duties were to change the bedding, bathe the patient, assist with medications and perform some housework. The claimant alleged that she had gone outside to hang up a load of laundry as the dryer in the house was broken. As she stepped over a small fence she held onto a fencepost which broke and she fell down on her right knee. Claimant picked up the laundry and went back into the house to examine the extent of her injuries. She testified she then called the respondent about 3 or 3:30 p.m. and talked to Stacy requesting medical treatment. Claimant further testified that she was advised to finish her shift and that Stacy would call her later. She reported to work the next morning, received her check and was advised that she had been terminated. Claimant testified she had not had any medical treatment or problems with her right knee before the injury.

On respondent's behalf, Stacy White, supervisor and office manager, testified the claimant was terminated on July 6, 2006, due to complaints from patients and that she was not aware of the claimant's knee injury until she received documentation from claimant's attorney in mid-August. Ms. White denied she received a telephone call from claimant on July 5, 2006.

Ms. White testified that respondent creates a log of all telephone calls whether from an employee or client. Ms. White reviewed the telephone log of July 5, 2006. She noted that respondent had called claimant's home at 5:18 p.m. on July 5, 2006, and had left a message that she return the call and further informed claimant that her future shifts had been cancelled. Claimant returned the call at 7 p.m. and was told she needed to come into the office and speak with Ms. White the following morning. Claimant called again at 7:32 p.m. questioning why she was being pulled from her shifts and was again told she needed to come in and speak with Ms. White.

On July 6, 2006, claimant met with Ms. White and was told that due to patient complaints she was being terminated. Ms. White testified that during the conversation claimant never stated she had injured her right knee the day before nor did she request medical treatment for her right knee.

On July 12, 2006, claimant sought emergency room medical treatment for her knee. Later an MRI was performed which revealed the claimant had a torn right medial meniscus which needed surgical repair.

When Ms. White became aware that claimant was alleging a work-related injury she conducted an investigation. Initially she checked the Personal Care Attendant Daily Visit Report for July 5, 2006. All of respondent's employees providing in-home care are required to fill out the form each day they work. The form contains a comment section to be filled in if the employee suffers an accidental injury. The July 5, 2006 report was signed by claimant and the patient's son but the comment section was blank. Ms. White also contacted the patient's son and was told the dryer was working so there would have been no need to hang laundry on the line to dry outside.

The Workers Compensation Act places the burden of proof upon the claimant to establish the right to an award of compensation and to prove the conditions on which that right depends.<sup>1</sup> "Burden of proof" means the burden of a party to persuade the trier of facts by a preponderance of the credible evidence that such party's position on an issue is more probably true than not true on the basis of the whole record."<sup>2</sup>

The claimant alleged injury due to a fall at work while attempting to hang laundry on a line to dry. She alleged that she told her supervisor, Stacy, about the accident in a call at approximately 3 p.m. She further testified that she again mentioned her knee injury the following day when she was told she was being terminated. Lastly, claimant testified that she had never had knee problems nor treatment for her right knee before July 5, 2006.

Ms. White testified that she did not talk to claimant on July 5, 2006, and respondent's telephone log corroborated her testimony. Ms. White further testified that claimant did not mention a knee injury or request medical treatment at their meeting on July 6, 2006. Although claimant initially testified that she asked about her knee at the July 6, 2006 meeting, on cross-examination she admitted that she did not mention her knee during that conversation with Ms. White. Although claimant testified that she had no problems with her right knee before July 5, 2006, the respondent introduced a medical record dated March 4, 2006, which contained a history that claimant stated she could not walk a straight line because of problems with her right knee. And Ms. White noted that claimant had always walked with a limp at work. Ms. White testified:

Q. Did she mention anything to you at all about a right knee injury or pain in her right knee?

A. No. In my investigation I did find some documentation from when she was being counselled by a clinical supervisor in August of '05 when the supervisor informed her that she would be pulling her from those shifts. She made a plea to her that she really needed to work those shifts. That she had recently been on unemployment and that her right knee had been bothering – she may not have said right knee.

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<sup>1</sup> K.S.A. 2006 Supp. 44-501(a).

<sup>2</sup> K.S.A. 2006 Supp. 44-508(g).

She said that her knee had been bothering her and she just didn't know if she could work facility work.

Q. Okay. And that was in August of '05 you said?

A. Correct.

Q. This is almost a year before this injury?

A. Yes. She also had always walked with a visible limp.

Q. Okay.

A. And, in fact, on the day that she came into the office on the 6th, she came into the office with one impairment of gait and then as she was making her threats of, "Well, we'll see what unemployment has to say about this," or "We'll see what the State of Missouri has to say about this," her limp became much more severe as she was walking out until she got about two-thirds of the way to her car, then it went back to a normal --

Q. What you had seen previously?

A. Yes.<sup>3</sup>

Claimant testified that she was carrying the laundry outside to dry because the patient's dryer was broken. Ms. White contacted the patient's son who indicated that the dryer was not broken. Ms. White testified:

Q. After you first received your notice in August, 2006 did CareStaf perform an investigation?

A. Yes.

Q. Did that investigation include contacting the patient and the patient's family?

A. Yes.

Q. What did that investigation reveal?

A. The patient indicated that there would have been no reason for her to be outside. That the washer and dryer were both functioning, so he wasn't sure why she would have been outside.

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<sup>3</sup> White Depo. at 14-15.

Q. Now, I understand you spoke with the patient's son, is that right, or CareStaf spoke with the patient's son?

A. Yes.

Q. And then, and he's the one that indicated to you that the washer and dryer were fully operational?

A. Correct.<sup>4</sup>

Based upon the evidence compiled to date, this Board Member finds claimant has failed to meet her burden of proof that she suffered accidental injury arising out of and in the course of her employment or to establish that she provided timely notice. Consequently, the ALJ's Order is reversed and claimant is denied compensation.

By statute, the above preliminary hearing findings and conclusions are neither final nor binding as they may be modified upon a full hearing of the claim.<sup>5</sup> Moreover, this review of a preliminary hearing Order has been determined by only one Board Member, as permitted by K.S.A. 2006 Supp. 44-551(i)(2)(A), as opposed to being determined by the entire Board when the appeal is from a final order.<sup>6</sup>

**WHEREFORE**, it is the finding of this Board Member that the Order of Administrative Law Judge Steven J. Howard dated April 30, 2007, is reversed and compensation denied.

**IT IS SO ORDERED.**

Dated this \_\_\_\_\_ day of July 2007.

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BOARD MEMBER

c: Margaret E. Dean, Attorney for Claimant  
Elizabeth R. Dotson, Attorney for Respondent and its Insurance Carrier  
Steven J. Howard, Administrative Law Judge

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<sup>4</sup> *Id.* at 11-12.

<sup>5</sup> K.S.A. 44-534a.

<sup>6</sup> K.S.A. 2006 Supp. 44-555c(k).